



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-176539

November 13, 1972

Brown Boveri Corporation
1460 Livingston Street
North Brunswick, New Jersey 08902

Attention: Mr. Sigmund R. Balka
Vice President and General Counsel

Gentlemen:

This is in reply to your letters dated August 24, August 31 and September 5, 1972, protesting the proposed award of a contract to Westinghouse Electric Corporation under Bonneville Power Administration Solicitation No. 2420.

The solicitation requested bids for furnishing 500 kv power circuit breakers and related items. The record shows that your firm offered to furnish foreign source end items, while Westinghouse offered domestic source end items. Federal Procurement Regulations (FPR) 1-6.104-4(b) requires, in part, that each foreign bid be adjusted, for purposes of evaluation and comparison with bids for domestic end products, by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, except that a 12 percent factor is used if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern (as defined in FPR 1-1.801), or both. The Administration determined that Westinghouse is a labor surplus area concern and therefore adjusted your low bid by adding a 12 percent factor, resulting in its displacement by the Westinghouse bid.

Essentially, it is your position that the Administration should reject the bid of Westinghouse as nonresponsive for failure to show unit bid prices, as called for by the terms of the solicitation. You also protest the propriety in this instance of applying the 12 percent differential, rather than 6 percent, since the Westinghouse bid did not indicate which labor surplus area preference was claimed.

PUBLISHED DECISION
52 Comp. Gen. _____

The format of the solicitation listed five bidding groups, the first four covering the delivery of varying quantities of circuit breakers to four different locations. In each of the first four groups three related subitems were listed in addition to the basic circuit breakers. Blank spaces for inserting unit and extended prices were provided for the basic circuit breakers as well as for each of the related subitems. (The fifth bidding group covered only a single item, a spare parts set, and is not relevant to our discussion of the responsiveness of the Westinghouse bid.) While the solicitation provided that award would be made by group, it also provided for bidding a lump sum amount, as follows:

"Offers for furnishing two or more of the items may be submitted in the following space. However, offers which do not show unit prices as called for herein * * * will be rejected as not responsive to the Solicitation. If award of contract is made on the basis of a lump-sum as shown below, the amount to be paid for any item shall bear the same ratio to the lump-sum offered that the price offered for such item bears to the sum of the prices offered for the items comprising the lump-sum offer. If sub-items a, b and c are to be included, the offeror must so state."

The record shows that Westinghouse bid a unit price for each of the basic items and indicated by inserting the word "Included" in the spaces available for all subitems that those prices included the cost of the subitems. Since separate prices for the subitems were not stated in its bid, it is your contention that such failure rendered the Westinghouse bid nonresponsive.

The contracting officer has taken the position that, notwithstanding the failure of Westinghouse to show separate prices for subitems, the bid binds the company to furnish the circuit breakers together with the related subitems at a price which can be determined, and the failure to price the subitems separately is therefore immaterial.

It is well established that bids which do not conform to the requirements of a solicitation must be rejected as nonresponsive, unless the deviation is immaterial or is a matter of form rather

than substance.—A deviation is considered material, and is cause for rejection, if it affects price, quantity or quality. (B-175243, June 16, 1972), however, a requirement in a solicitation is not necessarily material simply because it is expressed in positive terms with a warning that failure to comply "may" or "will" result in rejection of the bid as nonresponsive. See 39 Comp. Gen. 595 (1960) and FPR 1-2.405.

In the present case we believe the failure to insert prices for the subitems was not a material deviation from the terms of the solicitation, since the bidder, by inserting the word "Included" in the spaces available for all subitems, would be obligated to furnish the subitems, as well as the basic circuit breakers, at the price bid for the basic circuit breakers. While you have cited prior decisions of this Office in support of your position that the bid should be rejected as nonresponsive, in each of the decisions, unlike the present case, the bidder's failure to submit prices for all items raised substantial questions as to whether the bidder could be required to perform all of the work required at the prices set out in his bid.

In connection with your objection to the Government's action in applying the 12 percent differential on the basis that Westinghouse is a labor surplus area concern, you state that since Westinghouse failed to indicate which labor surplus preference it was claiming on EPA Form 972, which was submitted with the bid, the company was not entitled to receive any preference.

Our review of the Westinghouse bid reveals that while the company failed to indicate which preference it claimed, the company did specify the location at which it would perform 100 percent of the work under the contract, and that such information was required if the bidder was claiming a preference. Pursuant to FPR 1-6.104-4(b), your foreign bid is required to be adjusted by adding a 12 percent factor if the low domestic bidder is a labor surplus area concern as defined in FPR 1-1.801. Since the latter regulation includes in its definition of a labor surplus area concern any firm which will perform in a substantial labor surplus area as classified by the Department of Labor (DOL) in its publication entitled "Area Trends in Employment and Unemployment", and since the location at which Westinghouse is committed to perform the contract was so listed and is within such an area, we must conclude that the 12 percent factor was properly used in evaluating the bids.

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We note that you have cited decisions of this Office wherein we have held that a bidder could not be permitted to establish priority as a "certified-eligible concern" for labor surplus set-aside negotiations if the bidder failed to furnish with its bid evidence of its certification by the DOL, as required by the terms of the solicitations and the applicable regulations. However, the cases cited are not relevant to the situation at hand which, unlike the cited decisions, does not involve a labor surplus set-aside procurement. Moreover, for purposes of the Buy-American preference a domestic bidder need not be a "certified-eligible concern" but only needs to satisfy the broader definition of a labor surplus area concern as indicated above.

For the reasons stated your protest must be denied.

Very truly yours,

M.F. KELLER

Deputy Comptroller General
of the United States